

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P. (Cr.) No. 536 of 2022

Afan Ansari, aged about 19 years, son of Safruddin Ansari, resident of Village Melan, P.O. Silagi, P.S. Chanho Melani, District- Ranchi

... **Petitioner**

-Versus-

1. The State of Jharkhand

2.

Silagi, P.S. Chanho, District- Ranchi

P.O.

... **Respondents**

PRESENT

HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI

For the Petitioner : Mr. Bibhash Sinha, Advocate

For the State : Mr. Ashok Kumar Yadav, Sr. S.C.-I

Mr. Rituraj, A.C. to Sr. S.C.-I

Ms. Priyanka Boby, A.C. to Sr. S.C.-I

C.A.V. on 09.12.2022

Pronounced on 20.12.2022

Heard Mr. Bibhash Sinha, learned counsel for the petitioner and Mr. Ashok Kumar Yadav assisted by Mr. Rituraj and Ms. Priyanka Boby, learned counsel for the State.

2. This petition has been filed for quashing the order dated 15.09.2022 passed by the learned Special Judge, POCSO, Ranchi in POCSO Case No.89 of 2020 (Chanho P.S. Case No.89 of 2020), whereby, the petition dated 07.07.2022 filed on behalf of the petitioner for his DNA examination and the child is rejected, pending in the court of the learned Special Judge, POCSO, Ranchi. The prayer is also made for direction for DNA examination of the petitioner and the child in POCSO Case No.89 of 2020 (Chanho P.S. Case No.89 of 2020).

3. Mr. Bibhash Sinha, learned counsel for the petitioner submitted that in a mechanical way, charge-sheet has been submitted against the petitioner for an alleged offence under Section 376 of the Indian Penal Code (IPC) as well as under Section 4/6 of the Protection of Children from Sexual Offences

(POCSO) Act, 2012. Thereafter, the charges have been framed against the petitioner and he was put on trial. He further submitted that nine witnesses have already been examined and upon closure of the prosecution evidence, the statement of the petitioner was recorded under Section 313 of the Code of Criminal Procedure (Cr.P.C.) on 22.06.2022 in which the petitioner in its defence has pleaded his innocence. He also submitted that in that statement, the petitioner has stated that he wants DNA test. He further submitted that the petitioner has earlier moved before this Court in Cr.M.P. No.127 of 2021 challenging the cognizance order as well as the order rejecting the prayer for DNA test of the child. He submitted that although the Court has not interfered with the cognizance order, however liberty was provided to the petitioner to file a petition for conducting DNA test of the child at proper stage. He submitted that the petition has been filed on behalf of the petitioner, which has been rejected by the learned court vide order dated 15.09.2022 on flimsy ground. He further submitted that in the impugned order only on the ground of delay, the prayer for DNA test has been rejected in spite of the observation of the High Court. To buttress his arguments, he relied upon the judgment passed by the Hon'ble Supreme Court in ***Sharda v. Dharmpal; [(2003) 4 SCC 493]***.

4. Paragraphs 76, 79 and 80 of the said judgment are quoted herein below:

"76. *The matter may be considered from another angle. In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia etc. normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by a spouse against the other spouse seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If the respondent avoids such medical examination on the ground*

that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as an absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash. In matters of the aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus the court has to reconcile these competing interests by balancing the interests involved.

79. *If despite an order passed by the court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out. Section 114 of the Indian Evidence Act also enables a court to draw an adverse inference if the party does not produce the relevant evidences in his power and possession.*

80. *So viewed, the implicit power of a court to direct medical examination of a party to a matrimonial litigation in a case of this nature cannot be held to be violative of one's right of privacy."*

5. On these grounds, learned counsel for the petitioner submitted that the impugned order dated 15.09.2022 is bad in law and direction may kindly be issued for DNA test.

6. Per contra Mr. Ashok Kumar Yadav, learned Sr.S.C.-I appearing for the respondent-State submitted that there are serious allegations of rape of a child against the petitioner and in each and every cases, DNA test is not a rule. He further submitted that in a case of offence under Section 376 of IPC committed by the petitioner then the result of the DNA test by itself would be of no avail. *Contra*, if the oral evidence of the witnesses including that of prosecutrix are found to be not sufficient to hold the petitioner guilty of the charge of rape, then the result of the DNA test even if it would go to establish the paternity will equally be of no avail. He also submitted that in a case of rape medical evidence is not always final but medical evidence

plays the role of secondary evidence. He submitted that the Hon'ble Supreme Court has held in **M.P. v. Dayal Sahu; (AIR 2005 SC 3570)** that non-examination of doctor in a case of rape is not always fatal to the prosecution when the testimony of the prosecutrix inspires confidence of the Court. He relied upon the judgments passed in **Anandamay Bag v. State of West Bengal & anr.; (2007 SCC OnLine Cal 249)**, **Sabur Hossain Biswas @ Paltu v. State of West Bengal & others; (2008 SCC OnLine Cal 18)** and **Sunil v. State of Madhya Pradesh; [(2017) 4 SCC 393]**. On these grounds, he submitted that there is no illegality in the impugned order dated 15.09.2022 and this petition is fit to be dismissed.

7. In light of the above submissions of the learned counsel for the parties, the Court has perused the materials on record and finds that admittedly the petitioner is charged under Section 376 of IPC and under Section 4/6 of POCSO Act. The seriousness of such type of cases was subject matter in **State of Rajasthan v. Om Prakash; [(2002) 5 SCC 745]** wherein in paragraph 19, it has been held as under:

"19. Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of the social stigma attached thereto. According to some surveys, there has been a steep rise in child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are the country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuse. These factors point towards a different approach required to be adopted. The overturning of a well-considered and well-analysed judgment of the trial court on grounds like non-examination of other witnesses, when the case against the respondent otherwise stood established beyond any

reasonable doubt was not called for. The minor contradiction of recovery of one or two underwears was wholly insignificant."

8. The responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to the children, which was considered by the Hon'ble Supreme Court in ***State of Punjab v. Gurmit Singh; [(1996) 2 SCC 384]*** in paragraph 21 of the said judgment, which reads as under:

"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

9. In several decisions, the Hon'ble Supreme Court held that in a case of rape medical evidence is not always final but medical evidence plays the role of secondary evidence including the judgments relied by Mr. Ashok Kumar Yadav, learned counsel appearing for the respondent-State. Even presuming that earlier plea was taken by the petitioner for DNA test, the

said test cannot be allowed in a routine way. For deciding the case under Section 376 of IPC, paternity of the child is not relevant as the same can be decided on oral evidence. Therefore, holding of DNA test will not be relevant to the consideration of the charge. The leading decision on this point is the decision in ***Goutam Kundu v. State of West Bengal; [1993 (3) SCC 418]***, where Their Lordships of the Supreme Court held that no person can be compelled to give sample of blood for analysis against his or her will and no adverse inference can be drawn for such refusal. At paragraph 26 of the judgment, Their Lordships held as follows

"From the above discussion it emerges—

- (1) that Courts in India cannot order blood test as a matter of course;*
- (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained;*
- (3) there must be a strong prima facie case is that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act;*
- (4) the Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman;*
- (5) no one can be compelled to give sample of blood for analysis."*

10. This decision was followed in ***Banarasi Dass v. Teeku Dutta; [2005 (4) SCC 449]***, where Their Lordships of the Supreme Court held again that the DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be issued.

11. Recently, the Hon'ble Supreme Court in ***Ashok Kumar v. Raj Gupta; [(2022) 1 SCC 20]*** held that sparing use of DNS finger test was opined and that was a case arising out of suit for ownership of certain property and the defendant has raised the plea that the plaintiff was not the son of the original owner thereof for whom the plaintiff has derived a title

and in that case also, the plea was made for conducting a DNA test, wherein, at paragraph 15, it has been held as under:

"15. DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality laid down in the unanimous decision of this Court in K.S. Puttaswamy (Aadhaar-5 J.) v. Union of India [K.S. Puttaswamy (Aadhaar-5 J.) v. Union of India, (2019) 1 SCC 1], wherein the right to privacy has been declared a constitutionally protected right in India. The Court should therefore examine the proportionality of the legitimate aims being pursued i.e. whether the same are not arbitrary or discriminatory, whether they may have an adverse impact on the person and that they justify the encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA test."

12. Thus, merely because something is permissible under the law, cannot be directed as a matter of course to be performed particularly when a direction to that effect may encroach privacy and physical autonomy of a person. Such direction would violate the privacy right of a person subjected to such test.

13. In the judgment passed in *Sharda (supra)*, as relied by Mr. Bibhash Sinha, learned counsel for the petitioner, the subject matter was arising out of matrimonial dispute and in the facts and circumstances of that case, that order was passed. Thus, that judgment is not helping the petitioner.

14. Moreover, there is statutory provision under Section 309 of Cr.P.C., which speaks that the enquiry or trial relating to offence under Section 376 of IPC and other specified offences being completed within two months from the date of filing of charge-sheet, which has been considered by the Hon'ble Supreme Court in ***State (NCT of Delhi) v. Shiv Kumar Yadav and another; [(2016) 2 SCC 402]***. Paragraph 23 of the said judgment reads as under:

"23. *The High Court made a reference to the Criminal Law Amendment Act, 2013 providing for trial relating to offences under Section 376 and other specified offences being completed within two months from the date of filing of the charge-sheet. Reference has also been made to the circular issued by the Delhi High Court drawing the attention of the judicial officers to the mandate of speedy disposal of session cases. The High Court also referred to the decisions of this Court in Lt. Col. S.J. Chaudhary v. State (Delhi Admn.) [Lt. Col. S.J. Chaudhary v. State (Delhi Admn.), (1984) 1 SCC 722 : 1984 SCC (Cri) 163] , State of U.P. v. Shambhu Nath Singh [State of U.P. v. Shambhu Nath Singh, (2001) 4 SCC 667 : 2001 SCC (Cri) 798] , Akil v. State (NCT of Delhi) [Akil v. State (NCT of Delhi), (2013) 7 SCC 125 : (2013) 3 SCC (Civ) 455 : (2013) 3 SCC (Cri) 63] and Vinod Kumar v. State of Punjab [Vinod Kumar v. State of Punjab, (2015) 3 SCC 220 : (2015) 2 SCC (Cri) 226 : (2015) 1 SCC (L&S) 712 : (2015) 1 Scale 542] , requiring the trials to be conducted on day-to-day basis keeping in view the mandate of Section 309 CrPC."*

15. In view of the above facts, reasons and analysis, the Court comes to a conclusion that there is no illegality in the impugned order. Hence, no relief can be extended to the petitioner.

16. Accordingly, this petition stands dismissed.

(Sanjay Kumar Dwivedi, J.)